Supreme Court, U.S.
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No. 98-1183

In The

Supreme Court of the United States

October Term, 1998

ANDERSON COMMUNITY SCHOOL CORPORATION,

Petitioner,

v.

JAMES RANDALL WILLIS, II, BY HIS NEXT FRIEND AND FATHER, JAMES RANDALL WILLIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Anderson Community School Corporation's drug testing policy which requires that all students suspended from school for any reason for three days or more take a urine test to screen for drug or alcohol use before they may be readmitted to school violate the Fourth Amendment to the United States Constitution as applied to respondent, who was not suspended for drug related activity and who, immediately after the activity which gave rise to the suspension, was examined by his Dean of Students who concluded that there was not reasonable suspicion to believe that respondent was under the influence of drugs or alcohol?

LIST OF PARTIES

Petitioner is Anderson Community School Corporation and Respondent is James Randall Willis, II, by his next friend and father, James Randall Willis.[1]

Petitioner has no parent companies, subsidiaries, or affiliates.

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[1] The petition of the school corporation notes that Mr. Willis and his son are respondents. In fact this action was brought only by James Randall Willis, II, by his next friend and father. There is therefore only one respondent.

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STATEMENT OF THE CASE

In December of 1997, respondent James Randall Willis, II, (hereinafter "Mr. Willis"), was a freshman at Anderson High School. He and another student engaged in a fight which resulted in both students being suspended for five (5) days for fighting. During the fight Mr. Willis verbally abused the other student, threw something at him, and punched him four to five times.

Immediately after the fight Mr. Willis and the other combatant were taken to the Dean of Students. The Dean observed Mr. Willis. The Dean noted nothing which gave him reasonable suspicion to believe that Mr. Willis was impaired or under the influence of drugs or alcohol. Nevertheless, Mr. Willis was not allowed to return to school following his five day suspension unless, and until, he submitted to a drug test through urinalysis. Upon his repeated refusals to take the test he was suspended again and was eventually suspended pending expulsion proceedings.

The basis for the drug test requirement is the drug testing policy of the Anderson Community School Corporation (hereinafter "ACSC") which the Seventh Circuit found to be a violation of the Fourth Amendment. The policy requires that any student suspended for any reason for three days or more must take a drug test before he or she is allowed into school. (The policy is attached as Appendix). (App. 1). Additionally, the policy provides that students who violate ACSC's tobacco policy, who are habitually truant, who demonstrate reasonable individualized suspicion, or who exhibit behaviors which lead the

school to suspect that the individual is under the influence of drugs, must also be tested. (App. 2).

The policy notes that it is targeting behaviors which "are not conclusive on their own that a student is using drugs, . . . [but] they are indicators that point to that possibility." (App. 1). In formulating the policy ACSC used professional literature which indicates that students under the influence of drugs and alcohol may exhibit a potentially endless list of behaviors, including defying rules and regulations. *Willis v. Anderson Community School Corp.*, 158 F.3d 415, 419 (7th Cir. 1998). Accordingly, the literature cautions that many of the potential indicators of adolescent drug use are normal behaviors in many adolescents and therefore what is most revealing in terms of potential drug use is clustering of behaviors, changes from the norm, and frequency of occurrence. *Id.*

Of the four freshman suspended for fighting at Mr. Willis' high school who have been tested under the policy, none tested positive. Altogether, in both of the high schools operated by ACSC 17% of freshman (12 out of 71) suspended for any reason were found to have tested positive. In both high schools 29% (85 of 291) of all the students tested after suspensions tested positive. This is slightly higher than the 26% (7 out of 27) of the students who tested positive in all high school grades after suspensions for fighting.

ARGUMENT

Reason for Denying the Writ

Plenary review in this case is inappropriate because the Court of Appeals correctly applied settled law from this Court in finding that the drug testing policy violated the Fourth Amendment. Although the petitioner urges that the Seventh Circuit decision conflicts in principle with both *Vernonia School District 47 J v. Acton*, 515 U.S. 646 (1995) and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the decision of the Court of Appeals is entirely consistent with both of those opinions. The petitioner merely seeks to correct what it deems to be a misapplication of a properly stated rule of law. This does not afford a reason for granting the petition. The petitioner also urges this Court to expand its *Vernonia* holding. However, this case is unique. There is not a conflict among the circuits. There are apparently no similar lower court decisions even in the district courts. The Court of Appeals' decision does not violate any holding of this Court and the expansion requested by petitioner would violate the principles established in *Vernonia*. The petition fails to demonstrate any of the usual reasons that this Court deems to be necessary in order to grant a writ of certiorari.

A. The Seventh Circuit decision in this case does not conflict with *Vernonia* and it correctly applied the fact-based test present in that case to reach the proper conclusion that application of the policy violated Mr. Willis' constitutional rights

In *Vernonia* this Court approved of random, suspicionless, urine tests of high school athletes only after undertaking a fact-based balancing test which considered

the privacy interests of the students, the character of the intrusion, and the nature of the governmental concern and whether the means chosen are efficacious in meeting this concern. 515 U.S. at 654, 658, 660. The Seventh Circuit in this case recognized that this was the test set out by this Court. *Willis*, 158 F.3d at 421. However, ACSC disagrees with the result reached by the Court upon application of this fact-bound test. Even if the result reached by the Court of Appeals was incorrect, which it was not, error in applying the *Vernonia* test does not afford grounds for review since, at most, ACSC is complaining of "the misapplication of a properly stated rule of law." Supreme Court Rule 10.

ACSC disagrees with the Seventh Circuit's conclusion that Mr. Willis' privacy interest in not wanting to take a drug test in order to resume his compulsory education, *Ind. Code* 20-8.1-3-17, is greater than a high school athlete's interest in taking part in a voluntary extracurricular activity. It is true that both Mr. Willis and student-athletes are students and that for both the school has an interest as "guardian and tutor of children entrusted to its care." *Vernonia*, 515 U.S. at 665. However, the Seventh Circuit correctly noted that this Court in *Vernonia* recognized a number of ways that the privacy interests of student-athletes are diminished to a greater degree than other students. Athletes are used to, and should expect, the general lack of privacy associated with communal undress and the extensive regulation of their athletic endeavors. *Vernonia*, 515 U.S. at 656-57. Mr. Willis, who has not surrendered any of his privacy since he is not engaging in athletics, therefore has a much greater privacy interest than would an athlete.

This Court in *Vernonia* also noted that the privacy interests of the athletes were diminished because they had voluntarily chosen to engage in this activity. *Vernonia*, 515 U.S. at 657. Unlike student-athletes who can avoid the drug test by not participating in athletic endeavors, having engaged in a fight Mr. Willis could not avoid testing. And, as the Seventh Circuit correctly noted, any argument that getting into a fight is voluntary in the same manner as participating in athletics is "strained." *Willis*, 158 F.3d at 422. The reality is that 15 year old youth sometimes act foolishly and impetuously and the Court of Appeals recognized that this immaturity does not equate to the voluntariness found in *Vernonia*. Moreover, as conceded by ACSC at oral argument, the policy would be applied to someone who fights back in an altercation. "Certainly the decision to return a punch – often made in less time than it takes the aggressor to deliver the second blow – cannot be analogized to the sort of measured conduct or degree of control discussed in Vernonia." 158 F.3d at 422.

The privacy interest of Mr. Willis is therefore greater than that of the student-athletes in *Vernonia*. Contrary to the arguments of ACSC in its petition the Seventh Circuit did not err in giving more weight to Mr. Willis' privacy interests.

There is, as recognized by the Court of Appeals, also a distinct difference in the efficacy of the policy in *Vernonia* and that present here. In determining that a random drug testing procedure was constitutional this Court in *Vernonia* noted that a system which required tests to be justified by individualized cause would be extremely difficult, if not impossible. 515 U.S. at 663. There are not

similar impediments to a cause based system here. As noted by the Court of Appeals, before a student may be suspended Indiana law requires that he must meet with a school official, unless the student's misconduct requires immediate removal of the student, in which case the meeting must take place as soon as is reasonably possible. *Ind. Code* 20-8.1-5.1-12. Indeed, Mr. Willis met with the Dean of Students who concluded after observing the student that there was nothing which gave the Dean reasonable suspicion to believe that Mr. Willis was under the influence. This mandated requirement of physical observation did not exist in either *Vernonia* or in any of the other "special needs" cases allowing random drug tests. *National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). Indeed, these latter cases emphasized the fact that it was impractical to require individualized testing of the workers involved because it was often impossible to subject the persons to be tested to any degree of scrutiny. *See Von Raab*, 489 U.S. at 674; *Skinner*, 489 U.S. at 631. The Court of Appeals recognized that this case presented a different scenario, one where it was feasible to subject students to "the kind of day-to-day scrutiny that is the norm in more traditional office environments." *Von Raab*, 489 U.S. at 674.

ACSC disagrees with this conclusion, and argues that because toxicity from drugs may remain in the student's system for several days that a student, although brought before the Dean of Students, may not appear to be under the influence, thus making infeasible a system based on reasonable suspicion. However, the Dean of Students had available to him not only the physical presence of Mr.

Willis before him, but the ability to consult with teachers as to the student's behavior and appearance in the preceding days. All of this other potential evidence, specific to Mr. Willis, could of course be used to find cause to test him if the evidence had existed. *See e.g, Cornfield by Lewis v. School District No. 230*, 991 F.2d 1316 (7th Cir. 1993) (Erratic behavior of student, by itself, did not justify drug test. However, the test was justified by statements made by other students in the past and statements made by the student himself). As the Seventh Circuit noted, "[i]t is hard to believe that Deans of Students would have any difficulty justifying a finding of reasonable suspicion in fighting cases." *Willis*, 158 F.3d at 424. Nevertheless, the Dean in Mr. Willis' case concluded that there was not reasonable suspicion.[2]

The Court of Appeals engaged in the fact-based analysis and balancing required by *Vernonia*. It correctly noted the differences between a system designed to randomly test student-athletes and a system designed to test

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[2] ACSC argues that 89% of all students who tested positive did not exhibit signs of being impaired. (Petition of ACSC, p. 20, note 8). The underlying data which ACSC has used to generate this statistic does not measure the difficulty that school officials have in assessing if a student is impaired or the frequency that students exhibit signs of being impaired. The statistic only measures the frequency that administrators chose to suspend individuals for being under the influence, as opposed to other reasons. Given the fact that a drug test is required for other disciplinary behaviors, one can surmise from this statistic that school administrators find it easier to discipline for these other offenses rather than for being under the influence which may require a marshaling of evidence of prior behavior as well as the behavior giving rise to the suspension itself.

students who had engaged in negative behaviors and who were attempting to return to school following suspensions. The analysis engaged in by the Seventh Circuit conforms to that in *Vernonia*. It correctly found that "the balance of our 'context-specific inquiry' tips in favor of Willis." 158 F.3d at 425.

B. The decision does not violate the principle of *New Jersey v. T.L.O.* since the facts disclose that there was not reasonable suspicion present

The Seventh Circuit found that there was not reasonable suspicion justifying the drug testing of Mr. Willis. Again, ACSC disagrees with this determination based on the circumstances of this case. However, it is clear that the Court of Appeals correctly enunciated the reasonable suspicion standard determined by *T.L.O.* As with the issue above, ACSC is merely complaining that the Court of Appeals misapplied a properly stated principle of law. This does not create cause for granting ACSC's petition. Supreme Court Rule 10. Moreover, it is clear that the Court of Appeals' conclusion is correct.

ACSC has constructed a convoluted argument that Mr. Willis' one act of fighting gave rise to reasonable suspicion of drug use despite the fact that the Dean of Students, whose job it is to observe students prior to suspension, indicated that he saw no evidence of reasonable suspicion. Moreover, the ACSC policy itself recognizes that reasonable suspicion can exist to justify a drug test (App. 2), but Mr. Willis was informed that he had to take the test, not because reasonable suspicion existed,

but because of the policy. Nevertheless now, after the fact, ACSC argues that there was reasonable suspicion.

There is no doubt that there is a potential relationship between drug use and bad student behavior. However, it is also clear from the statistics of ACSC that most students who engage in behavior which result in suspensions are not under the influence of drugs or alcohol. It is also clear from the professional literature that the behavior which is most indicative of possible drug use is a clustering of negative behaviors. Mr. Willis was in one fight. There was no clustering.

At the time that he was disciplined, ACSC had ample opportunity to observe Mr. Willis and to conclude that there was reasonable suspicion that he was using drugs. The observation was made, and the conclusion was that there was not reasonable suspicion. *T.L.O.* requires that there must be "reasonable grounds for suspecting that the search will turn up evidence that" Mr. Willis was under the influence. 469 U.S. at 341-42. The Court of Appeals recognized that this one act of fighting did not create this suspicion. *T.L.O* was not violated either in principle or in any other manner.

C. This case does not present the opportunity to extend the holding of *Vernonia*

Curiously, although ACSC begins its petition by arguing that the Court of Appeals' decision in some way violated Supreme Court precedent, it concludes its petition by arguing that this case presents an opportunity to expand *Vernonia*. This expansion argument is made even though this case appears to be unique in the United

States. There is no conflict among the circuits, there is no conflict with decisions of this Court, there are apparently no other lower court decisions considering this issue. Petitioner does not argue to the contrary. Given this, it would be inappropriate to use this case as a vehicle for the expansion of any holding.

Moreover, as indicated above, ACSC is not seeking to expand *Vernonia*, it is seeking to have this Court ignore *Vernonia*. *Vernonia* set out a careful fact-based balancing test which the Court of Appeals observed. It is clear from *Vernonia* that the potential risk of harm from drugs is not, in and of itself, sufficient to overcome the privacy interests of all students, even those who have not taken the voluntary step of engaging in high school athletics. This is especially true where here, as opposed to the situation in *Vernonia*, school administrators are present to assess whether the student's behavior and other factors create sufficient cause to justify a drug test under *T.L.O.* This Court has, through *T.L.O.* and *Vernonia* established the parameters in this area. There is no need to expand these boundaries.

CONCLUSION

Certiorari is not warranted. The Seventh Circuit correctly applied both *Vernonia* and *T.L.O.* ACSC seeks to challenge this settled law and the results which the Seventh Circuit reached through its application. There are

not grounds for granting the petition and for the foregoing reasons it should be denied.

Respectfully submitted,

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APPENDIX

Policy 5512

STUDENTS

SECONDARY

Drug Testing

Research on adolescent substance abuse indicates a general consensus regarding the fact that certain behaviors can help identify those adolescents who are using alcohol or other drugs on a regular basis. Those behaviors include areas that can be easily identified in a school setting such as truancy and tardiness, verbal and physical abuse towards staff or classmates, vandalism, absenteeism, and a sudden drop in grades. These behaviors are not conclusive on their own that a student is using drugs, but they are indicators that point to that possibility.

The purpose of this drug testing policy is to help identify and intervene with those students who are using drugs as soon as possible and to involve the parents immediately. When students commit a disciplinary infraction which results in suspension from school for three (3) days or more, they will be required to submit to a drug test. The results of the test are for parental use only and will not result in any additional punishment by school officials. It will then be up to the parents with the help provided by the designated school official to seek the best treatment for the individual student.

Policy Adopted: August 5, 1997

Rule 5512

STUDENTS

SECONDARY

Drug Testing

Because tobacco use, involvements in fights, and continuous negative behaviors often indicate potential drug use, any student who commits any of the following acts must submit to a drug test administered under school supervision:

1. Violates the school's tobacco policy (possessing and/or using tobacco products).
2. Is suspended from school for three (3) or more days for fighting.
3. Violates any other school rule that results in the student being suspended from school for three (3) or more days.
4. Habitual truancy.
5. Reasonable individualized suspicion.
6. In addition, the school may require a student to submit to a test for drugs and alcohol, if a student exhibits behaviors which lead school authorities to suspect the student is under the influence of a controlled substance. Further, the school may subject items in such student's possession to tests to decide if those items contain drugs or alcohol. Any student found to be under the influence or in possession of alcohol or other drugs will be dealt with according to the student discipline policy.

The results of the drug test will be provided to the designated school official who will always share the

results with the parents. If the results are positive, the designated school official will proceed as follows:

I. **FIRST POSITIVE TEST** – The results of the test will only be provided to the parent(s) or guardian(s) and the principal/designee. The designated school official will work with the parents to provide evaluation and/or treatment as indicated.

II. **SECOND POSITIVE TEST** – The results of the test will only be provided to the parent(s) or guardian(s) and the principal/designee. The designated school official will work with the parents to provide evaluation and/or treatment as indicated.

III. **THIRD POSITIVE TEST** – The parents will be required to pay for the drug test and the results of the test will be provided to both the parents and the principal/designee. The designated school official will work with the parents to provide evaluation and/or treatment as indicated.

Anderson Community Schools officials will provide information regarding school approved drug education programs in which the student must participate. Refusal to participate in such a program may result in expulsion from school.

Refusal to submit to a drug alcohol test will be considered an admission of being under the influence of alcohol or other drugs. This is a violation of school rules and will be dealt with according to the student discipline policy. The administration/designee shall develop procedures to carry out this policy.

Anderson Community Schools will assume the cost of only the initial drug screen on the first and second

offenses at a corporation approved site. A parent/guardian may request a confirmation screening from the sample taken. However, this fee will be incurred by the parent/guardian.